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No. 82-842

In the Supreme Court of the United States

OCTOBER TERM, 1982

JAMES D. RAY, PETITIONER

v.

TENNESSEE VALLEY AUTHORITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE TENNESSEE VALLEY AUTHORITY, ITS BOARD OF DIRECTORS, AND ARNOLD E. BRIGLIA IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the courts below correctly held that petitioner's attempt to relitigate his 1973 termination of employment with the Tennessee Valley Authority was barred by the doctrine of res judicata.

2. Whether the courts below correctly held that petitioner's claim that he had been defamed by a TVA employee's remark in 1979, unconnected with an employment decision concerning petitioner, did not state a federal cause of action and did not call for the exercise of pendent federal jurisdiction.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Eastland v. *Tennessee Valley Authority*, 638 F.2d 1232, rehearing denied, 641 F.2d 879	3
Federal Department Stores, Inc. v. *Moitie*, 452 U.S. 394	6
Johnson v. *Railway Express Agency, Inc.*, 421 U.S. 454	6, 7, 8
Marrero v. *City of Hialeah*, 625 F.2d 499, cert. denied, 450 U.S. 913	4-5
Owen v. City of Independence, 445 U.S. 622	4
Paul v. *Davis*, 424 U.S. 693	4
Ray v. *Tennessee Valley Authority*, 521 F.2d 812, cert. denied, 424 U.S. 973	2
United Mine Workers v. *Gibbs*, 383 U.S. 715	8
United Parcel Service v. *Mitchell*, 451 U.S. 56	6
Youakim v. *Miller*, 425 U.S. 231	8

Statutes:

Back Pay Act:	
5 U.S.C. (& Supp. IV) 5596	7
5 U.S.C. 5596(b)	7
Equal Employment Opportunity Act of 1972, 42 U.S.C. (& Supp. IV) 2000e *et seq.*	5, 7
Veterans' Preference Act of 1944:	
5 U.S.C. (Supp. V) 3315(a)	7

Statutes—Continued: Page

5 U.S.C. (Supp. V) 2102(a)(1)(A) 2
5 U.S.C. (& Supp. V) 2103 2
16 U.S.C. 831b 2
42 U.S.C. 1981 7
Ala. Code § 6-2-39(a)(5) (1975) 3, 6

Miscellaneous:

27 Empl. Prac. Dec. (CCH) ¶ 32,143 3

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OPINIONS BELOW

The opinion of the court of appeals on the merits (Pet. App. A1-A31) is reported at 677 F.2d 818. The order denying rehearing en banc is reported at 683 F.2d 1375. The opinion and order of the district court (Pet. App. A32-A39) are not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 1982, and a petition for rehearing and suggestion for rehearing en banc was denied on August 3, 1982. The petition for certiorari was filed on November 1, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This pro se petition for certiorari arises out of petitioner's third attempt[1] to litigate his termination in 1973, through a reduction in force (RIF), from his position as a research chemist with the Tennessee Valley Authority (TVA) at Muscle Shoals, Alabama.[2]

Petitioner appealed his termination to the former United States Civil Service Commission. In 1974, after the Commission's Board of Appeals and Review denied petitioner's appeal (Pet. App. A43-A45), petitioner filed an action in district court against the TVA, its Board of Directors, and several TVA officials claiming that his RIF termination was a sham and that he improperly had been terminated by the TVA (*id.* at A9). Summary judgment was granted for defendants on November 12, 1974 (*id.* at A40-A42), and the former Fifth Circuit dismissed petitioner's appeal as untimely.[3] See *Ray* v. *Tennessee Valley Authority*, 521 F.2d 812 (1975), cert. denied, 424 U.S. 973 (1976).

Petitioner attacked his RIF for a second time in 1980 when he attempted to intervene as a class mem-

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[1] Since his unsuccessful appeal of the district court's decision in this case, petitioner has instituted a fourth lawsuit against the board of directors of the TVA and the Equal Employment Opportunity Commission concerning his termination of employment. See *Ray* v. *Dean*, CD82-HM-5239-NW (N.D. Ala.)

[2] TVA is a federal corporation whose employees are in the "excepted" rather than the "competitive" service. 16 U.S.C. 831b; 5 U.S.C. (Supp. V) 2102(a)(1)(A); 5 U.S.C. (& Supp. V) 2103.

[3] However, the Fifth Circuit also stated that it had reviewed the merits of the district court's decision and found no error (See Pet. App. A9 n.2).

ber in *Eastland* v. *Freeman*, No. 73-G-487-NW (N.D. Ala.), a class action racial discrimination suit. The district court denied petitioner's motion to intervene (27 Empl. Prac. Dec. (CCH) ¶ 32,143 (N.D. Ala. 1980)), and the Fifth Circuit dismissed petitioner's appeal (*Eastland* v. *Tennessee Valley Authority*, 638 F.2d 1232 (1981)) and denied rehearing en banc (641 F.2d 879 (1981)).

In 1980, petitioner brought the present action against the TVA and its Board of Directors, claiming that the TVA's RIF violated his "employment contract" with the TVA and his "reemployment rights" under the Veterans' Preference Act of 1944. Petitioner also claimed that Arnold E. Briglia, a TVA budget officer, defamed him in October 1979 by stating that petitioner had been "fired" in 1973.

The district court entered summary judgment against petitioner. Finding that "the substantive issue remains the same as those previously litigated" in petitioner's 1974 action and petitioner's unsuccessful attempt to intervene in the class action against the TVA (Pet. App. A35-A36), the district court held that petitioner's breach of contract claim was barred by the doctrine of res judicata (*id.* at A37). The district court also held that petitioner's Veterans' Preference Act claim was barred by the applicable one-year statute of limitations (*id.* at A37-A38).[4] The district court dismissed petitioner's defamation claim on the ground that it was a state law claim over which

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[4] Finding that federal law did not provide a statute of limitations for Veterans' Preference Act claims, the district court applied the one-year limitations period prescribed by Ala. Code § 6-2-39(a)(5) (1975), which governs actions arising from an " 'injury to the person or rights of another' " (Pet. App. A37-A38).

the court had no subject matter jurisdiction (*id.* at A38-A39).

The court of appeals affirmed. Finding that a final judgment had been rendered against petitioner in his 1974 action against the TVA (Pet. App. A12), the court of appeals concluded that petitioner's claim in this action was barred by res judicata (*id.* at A13-A14):

> In each suit the primary right at issue was Ray's right of continued employment with the TVA, and in each suit Ray alleged that TVA interfered with that right by terminating his employment through a pretextual RIF. In substance, if not in form, the breach of contract alleged by Ray in this suit is identical to his claims in the 1974 litigation and thus falls squarely within res judicata doctrine.

The court of appeals similarly found petitioner's Veterans' Preference Act claim barred by res judicata, since it involved "substantially the same cause of action" (*id.* at A15). Alternatively, the court of appeals found petitioner's Veterans' Preference Act claim barred by the one year limitations period that Alabama law imposed upon analogous state law claims (*id.* at A17; see note 4, *supra*).

Although it found the issue more difficult to resolve than the district court had (Pet. App. A19), the court of appeals affirmed the district court's dismissal of petitioner's defamation claim. Following *Paul* v. *Davis*, 424 U.S. 693 (1976), and *Owen* v. *City of Independence*, 445 U.S. 622 (1980) (Pet. App. A18-A23), the court of appeals concluded that petitioner could state a federal cause of action if the defamation " 'occur[red] in connection with' " his termination of employment and was " 'reasonably related' " to the termination (*id.* at A23, quoting *Marrero* v. *City of*

Hialeah, 625 F.2d 499, 519 (5th Cir. 1980), cert. denied, 450 U.S. 913 (1981)). However, the court of appeals found that petitioner's defamation claim met neither requirement, since "the TVA employee who allegedly defamed Ray was a budget officer who had no connection whatsoever with the personnel decisions of the agency" (*id.* at A24) and "the alleged defamation occurred some six years after the TVA's RIF action against Ray" (*ibid.*). Concluding that petitioner stated no federal cause of action, the court of appeals held that the district court had not abused its discretion in refusing to exercise pendent federal jurisdiction over petitioner's state law defamation claim (*id.* at A26).[5]

ARGUMENT

The decision of the court of appeals does not conflict with any decision of this Court or any other court of appeals and does not warrant further review.

A. Petitioner contends (Pet. 17-19) that the courts below erred in dismissing his complaint because they found that his 1974 action was based upon the Equal Employment Opportunity Act, 42 U.S.C. (& Supp. IV) 2000e *et seq.*, while the present case alleges a breach of contract. Petitioner's arguments, however, misstate the facts. The district court found that petitioner's 1974 action raised the identical issue present in the present case: whether petitioner's "employment with T.V.A. was improperly terminated through a R.I.F. in 1973" (Pet. App. A36). The court of appeals likewise found that "[i]n each suit the primary right at issue was Ray's right of con-

[5] The court of appeals also affirmed the district court's dismissal of petitioner's malpractice claim against respondent Jack Drake on the ground that there was no diversity of citizenship (Pet. App. A28).

tinued employment with the TVA, and in each suit Ray alleged that TVA interfered with that right by terminating his employment through a pretextual RIF" (*id.* at A13). Moreover, even if petitioner were stating a genuinely different claim in the present case, the claim would properly be barred by res judicata, since the doctrine bars a party from relitigating issues that could have been raised in the prior action (*Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394, 398 (1981)), and both the 1974 action and the present case are based upon petitioner's termination from TVA employment in 1973.[6]

B. Petitioner's argument that the courts below improperly applied the Alabama one-year tort limitations period to his claim under the Veterans' Preference Act of 1944, is likewise without substance. Since the Veterans' Preference Act contains no statute of limitations, the district court and the court of appeals correctly referred to Alabama law in selecting a limitations period. See *United Parcel Service* v. *Mitchell*, 451 U.S. 56, 60 (1981); *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 462 (1975). The relevant provision of Alabama law, governing "injury to the * * * rights of another not arising from contract" (Ala. Code § 6-2-39(a)(5) (1975)),

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[6] Petitioner argues (Pet. 19) that the dismissal of his 1974 action should not have been given res judicata effect because the district court proceedings in the 1974 case involved only a review of the administrative record of petitioner's appeal to the Civil Service Commission. The district court's order dismissing the 1974 complaint (Pet. App. A40) gives no indication of the scope of the court's review. However, the courts below—which had before them petitioner's 1974 complaint (*id.* at A15, A35-36)—did not find petitioner's 1974 action so narrowly defined. Moreover, in his subsequent petition for certiorari (No. 75-6017, 1975 Term) in that case, petitioner raised the same issues as those in the present case.

properly applies to petitioner's Veterans' Preference Act claim, which seeks to vindicate a statutory right. Although petitioner has attempted to cast his Veterans' Preference Act claim as contractual to avoid the one-year limitations period (Pet. 22-23), it is clear from the face of the statute that the right petitioner seeks to enforce does not arise from his employment contract with the TVA. See 5 U.S.C. (Supp. V) 3315(a).[7]

Petitioner's suggestion (Pet. 24) that his pursuit of his appeals before the Equal Employment Opportunity Commission should toll the limitations period governing his Veterans' Preference Act claim also is without merit. In *Johnson* v. *Railway Express Agency, Inc.*, *supra*, 421 U.S. at 460-461, the Court held that the filing of employment discrimination charges with the EEOC should not operate to toll the limitations period for a parallel racial discrimination action brought under 42 U.S.C. 1981. As in *Johnson*, it is clear here that petitioner's EEOC charges and his Veterans' Preference Act claim are at best "independent administrative and judicial remedies." 421 U.S. at 461. Petitioner has cited no authority supporting his apparent contention that Congress considered the Equal Employment Opportunity Act and the Veterans' Preference Act so closely related that the filing of administrative charges with

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[7] Petitioner also attempts (Pet. 23-24) to characterize this action as one seeking contractual damages under the Back Pay Act, 5 U.S.C. (& Supp. V) 5596. Leaving to one side the question of the applicability of the Back Pay Act to this case, however, it is clear that the Act has no relevance here, where the termination of petitioner's employment with the TVA has not been found to be an "unjustified or unwarranted personnel action." 5 U.S.C. 5596(b).

the EEOC should toll the limitations period for petitioner's claim under the latter statute. See *Johnson*, *supra*, 421 U.S. at 461.

C. Finally, there is no merit to petitioner's argument (Pet. 15-16) that the courts below held that the TVA could not be sued for a tort arising under state law. Contrary to petitioner's assertions, neither the district court nor the court of appeals held that the TVA was not amenable to a state law tort claim or passed upon the merits of petitioner's state law claim. Rather, both courts held that petitioner had not stated a valid defamation claim under federal law (Pet. App. A19, A38-39). The district court did no more than refuse to exercise pendent federal jurisdiction over the claim. The court of appeals was correct in finding that this was a proper exercise of discretion, since petitioner had no substantial federal defamation claim and petitioner's state law defamation claim shared no common factual basis with the remaining counts of petitioner's suit. See *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 722, 728 (1966).[8]

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[8] Petitioner also has raised other issues in his petition that were not presented to the district court or the court of appeals. The Court need not reach these issues absent special circumstances which are not present here. See *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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